No. 90-1078

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. BISSELL CAREY, III
Counsel of Record
STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
(808) 527-5688

Attorneys for Respondent

Printed by
Rosado's Printing Services, Inc.
60 Connecticut Boulevard
East Hartford, CT 06108
528-4264

QUESTIONS PRESENTED[1]

1. Did the courts below err in concluding that a cause of action for inequitable precondemnation activities requires proof of no economically viable use?

2. Did the court of appeals err in concluding that "unconstitutional exaction" was not raised as a separate claim before the trial court?

3. Did the courts below err in concluding that certain of Petitioners' claims were not ripe for federal adjudication?

[1] These are the true questions presented, absent the hyperbole and misstatements contained in Petitioners' questions presented.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

A. The Subject Property: Queen's Beach 4

B. Land Use Plans Applicable To Queen's Beach . . 5

C. Zoning Ordinances Applicable To Queen's Beach 8

D. Efforts To Develop Queen's Beach 8

E. The Alleged Unconstitutional Conduct 10

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 12

I. THE COURTS BELOW PROPERLY CONCLUDED THAT A CAUSE OF ACTION FOR INEQUITABLE PRECONDEMNATION ACTIVITIES REQUIRES PROOF OF NO ECONOMICALLY VIABLE USE 12

II. THE SO-CALLED *NOLLAN* CLAIM WAS NOT RAISED AS A SEPARATE CLAIM BEFORE THE TRIAL COURT 15

TABLE OF CONTENTS (continued)

Page

III. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF BISHOP'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION 19

A. Bishop Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Bishop Ever Sought A Variance From Preservation Zoning 19

B. The Futility Exception Does Not Excuse Bishop From Meeting The Final Decision Requirement 22

C. Bishop Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Pages**

Agins v. City of Tiburon,
447 U.S. 255 (1980) 12, 14

Am. Savings & Loan Ass'n v. County of Marin,
653 F.2d 364 (9th Cir. 1981) 22

Austin v. City and County of Honolulu,
840 F.2d 678 (9th Cir.), *cert. denied*,
488 U.S. 852 (1988) 20, 21, 23, 24

Benenson v. United States,
548 F.2d 939 (Ct. Cl. 1977) 13

City and County of Honolulu v. Chun,
54 Haw. 287, 506 P.2d 780 (1973) 25

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 11

Commissioner v. McCoy,
484 U.S. 3, *reh'g denied*,
484 U.S. 982 (1987) 5

Drakes Bay Land Co. v. United States,
424 F.2d 574 (Ct. Cl. 1970) 13

First English Evangelical Lutheran Church v. County of Los Angeles,
482 U.S. 304 (1987) 17

Foster v. City of Detroit,
254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*,
405 F.2d 138 (6th Cir. 1968) 13

Herrington v. Sonoma County,
834 F.2d 1488 (9th Cir. 1987), *amended*,
857 F.2d 567 (9th Cir. 1988), *cert. denied*,
489 U.S. 1090 (1989) 20, 22, 23, 24

Hoehne v. County of San Benito,
870 F.2d 529 (9th Cir. 1989) 20, 23

TABLE OF AUTHORITIES (continued)

Cases:	Pages
Honolulu Memorial Park, Inc. v. City and County of Honolulu, 50 Haw. 189, 436 P.2d 207 (1967)	25
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	14, 15
Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986)	*passim*
Kaiser Dev. Co. v. City and County of Honolulu, 898 F.2d 112 (9th Cir. 1990)	*passim*
Kaiser Dev. Co. v. City and County of Honolulu, 913 F.2d 573 (9th Cir. 1990) *(per curiam)*	*passim*
Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)	20, 21, 22, 23
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)	14
Lai v. City and County of Honolulu, 749 F.2d 588 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988)	20, 21, 24
Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988)	20, 21, 22, 23
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	16, 20

TABLE OF AUTHORITIES (continued)

Cases:	Pages
Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)	2, 13, 14, 16, 22
Monell v. Dep't of Social Services, 436 U.S. 658 (1978)	11
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	*passim*
Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization, 63 Haw. 444, 630 P.2d 107 (1981)	6, 7, 9
Parks v. Watson, 716 F.2d 646 (9th Cir. 1983)	16
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	11
Penn Central Transp. Co. v. New York City, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978)	14
Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977)	11, 13, 14
Roberts v. College of the Desert, 870 F.2d 1411 (9th Cir. 1988)	4
Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988)	20, 21
Singleton v. Wulff, 428 U.S. 106 (1976)	5
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	*passim*

TABLE OF AUTHORITIES (continued)

Federal Constitutional Provisions: **Pages**

U.S. Const. art. I, § 10, cl. 1 1

U.S. Const. amend. V 1, 2, 24

U.S. Const. amend. XIV 1, 2

Federal Statutes:

42 U.S.C. § 1983 (1982) 1, 11

Rules of the Supreme Court:

Rule 10 15

Rule 14.5 26

Federal Rules of Civil Procedure:

Rule 54(b) 2

State Statutes:

Haw. Rev. Stat. § 46-6 (1985) 18

Haw. Rev. Stat. § 101-3 (1985) 24

Ordinances, Resolutions and Charter Provisions:

City and County of Honolulu Ordinance No. 2443 (May 7, 1964) 5

City and County of Honolulu Ordinance No. 2473 (July 23, 1964) 5

City and County of Honolulu Ordinance No. 2808 (June 8, 1966) 5

TABLE OF AUTHORITIES (continued)

Ordinances, Resolutions and Charter Provisions: **Pages**

City and County of Honolulu Ordinance No. 4517 (October 28, 1975) 5, 7

City and County of Honolulu Ordinance No. 4621 (August 17, 1976) 18

City and County of Honolulu Ordinance No. 83-6 (May 10, 1983) 8

City and County of Honolulu Ordinance No. 84-5 (March 1, 1984) 8

City and County of Honolulu Resolution No. 238 (February 2, 1977) 6

City and County of Honolulu Resolution No. 82-188 (December 23, 1982) 6

1959 Charter of the City and County of Honolulu § 5-512 5

1973 Rev. Charter of the City and County of Honolulu § 5-407 6

1973 Rev. Charter of the City and County of Honolulu § 5-408 6

1973 Rev. Charter of the City and County of Honolulu § 5-412 7

1973 Rev. Charter of the City and County of Honolulu § 6-1009 21

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioners Richard Lyman, Jr., et al., Trustees of the Bernice P. Bishop Estate ("Bishop"), filed an intervening complaint in this case on July 19, 1985. The claims of Bishop parroted those of Kaiser Development Company, et al. ("Kaiser"), the original plaintiff in this action. Read liberally, those claims sought relief pursuant to 42 U.S.C. § 1983 based on allegations that the land use regulations and other conduct of Respondent City and County of Honolulu ("the City") violated Bishop's rights involving a certain parcel of land known as "Queen's Beach" under the Fifth and Fourteenth Amendments to and the Contract Clause of the United States Constitution.

The City filed motions for summary judgment pertaining to all claims of Bishop and Kaiser. In its decision on the City's motion against Bishop, the United States District Court for the District of Hawaii (Honorable Samuel P. King, Judge) held as follows:

> Specifically, I find that . . . plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. -

926, 949 (D. Haw. 1986) (Petitioners' Appendix E at E 52).[2]

However, relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146-47 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), the court held that Bishop's "inequitable precondemnation activities" claim was not subject to the Supreme Court's "finality" requirements. 649 F. Supp. at 943 (Appendix E 37-38). The court, therefore, denied summary judgment against Bishop as to that claim.[3]

After the City's motion to enter judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was denied on November 13, 1986, Bishop's remaining claim went to trial before Judge King and a jury on June 26, 1987. At the conclusion of Bishop's case, the City moved for a directed verdict. The trial court granted the City's motion (Petitioners' Appendix C at C 6), and, subsequently, entered judgment dismissing Bishop's remaining claim.[4]

The district court's written decision and order granting the City's motion for directed verdict concluded that Bishop had failed to establish that an official intent existed to acquire any portion of Queen's Beach prior to passage of the 1982 General Plan (Appendix C 4);[5] that, in order to succeed on its

---

[2] References are made throughout this brief to Petitioners' Appendix. Specifically, reference is made to Petitioners' Appendices A and B (decisions by the court of appeals), to Petitioners' Appendix C (decision by the district court on the City's motion for directed verdict), and to Petitioners' Appendix E (decision by the district court on the City's motions for summary judgment).

[3] The district court granted summary judgment against Kaiser on all of its claims. 649 F. Supp. at 949 (Appendix E 52).

[4] Bishop's statement of the case indicates that the district court directed a verdict against it on its "remaining claims." *See* Bishop's Petition, p. 5. Presumably, Bishop is referring to claims under both the Fifth and Fourteenth Amendments for inequitable precondemnation activities. The so-called "*Nollan* claim" was not raised at trial. *See infra* Section II.

[5] Bishop did not appeal from this decision. Curiously, Bishop nevertheless dedicates the vast majority of its statement of facts to a hyperbolic description of pre-1982 conduct by various City personnel and agencies.

claim, Bishop was required to present evidence from which a fact-finder could reasonably conclude that Queen's Beach or a portion thereof was "taken" by the City (Appendix C 3); that, in order to prove a "taking," Bishop was required to present evidence that no economically viable use of Queen's Beach was available (Appendix C 5); and that Bishop had failed to do so. (Appendix C 5).

Bishop appealed to the Court of Appeals for the Ninth Circuit from both the district court's summary judgment as to all but one of its claims and from the district court's decision directing a verdict against it on its one remaining claim.

With regard to the district court's decision granting summary judgment, the court of appeals affirmed for the reasons stated in the district court's decision. *Kaiser Dev. Co. v. City and County of Honolulu*, 898 F.2d 112, 113 (9th Cir. 1990) (Petitioners' Appendix A at A 2).[6] In reaching its decision, the court of appeals reviewed cases decided subsequent to the district court's decision and concluded that none of those cases changed the validity of the district court's reasoning. *Id.* at 113 (Appendix A 2).

In a separate opinion addressing Bishop's claims of error in connection with the trial court's granting of the City's motion for directed verdict, *Kaiser Dev. Co. v. City and County of Honolulu*, 913 F.2d 573 (9th Cir. 1990) *(per curiam)* (Petitioners' Appendix B), the court of appeals concluded, as did the trial court (Appendix C 5), that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property. 913 F.2d at 575 (Appendix B 9). Having reached that conclusion, the court of appeals held, as did the trial court (Appendix C 5), that Bishop did not offer any substantial evidence that it had no economically viable use for its property. 913 F.2d at 576 (Appendix B 10). The court of appeals also

[6] Bishop's assertion that the decision by the court of appeals "[a]stonishingly . . . contains no holding" is groundless. *See* Bishop's Petition, p. 1 n.2. The court of appeals held that "[t]he decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Appendix E]." 898 F.2d at 113 (Appendix A 2).

concluded that Bishop did not raise an "unconstitutional exaction" claim at trial. *Id.* (Appendix B 10-11). Finally, the court of appeals concluded that the district court did not abuse its discretion in excluding certain evidence at trial. *Id.* (Appendix B 10).

Following the decision by the court of appeals, Bishop filed a petition for rehearing and suggestion for rehearing *en banc.* Therein, Bishop challenged the court of appeals' conclusion that its inequitable precondemnation activities claim required proof that there is no economically viable use of the subject property.[7] Bishop also contended in its petition for rehearing that an unconstitutional exaction claim was raised at trial.[8] Bishop's petition for rehearing was denied, and its suggestion for rehearing *en banc* was rejected. *Id.* at 574 (Appendix B 6).

Bishop has now petitioned this Court for a writ of certiorari.

STATEMENT OF FACTS[9]

A. The Subject Property: Queen's Beach

Petitioners own approximately 6,000 acres of land, now known as "Hawaii Kai," on the island of Oahu, State of

---

[7] Bishop also suggested that that conclusion created a conflict within the Ninth Circuit, but *see infra* note 31 and accompanying text.

[8] Bishop's petition for rehearing could also be read to challenge the court of appeals' conclusion that the trial court did not abuse its discretion in excluding certain evidence at trial. The court of appeals' conclusion, given the limited standard for appellate review of evidentiary questions, *see, e.g., Roberts v. College of the Desert,* 870 F.2d 1411, 1418 (9th Cir. 1988), certainly was the proper one, and, based on its questions presented, Bishop does not appear to be pursuing those evidentiary issues with this Court.

[9] Bishop's statement, *see* Bishop's Petition, p. 5 n.6, that the City, in its Appellee's Brief, did not dispute the facts as presented by Bishop to the *(continued)*

Hawaii.[10] The subject property is a 209.4 acre parcel in Hawaii Kai known as "Queen's Beach." Queen's Beach is vacant, undeveloped land.

B. Land Use Plans Applicable To Queen's Beach

As required by the 1959 Charter of the City and County of Honolulu, a General Plan for Oahu was enacted by ordinance effective May 7, 1964 ("1964 General Plan"). Immediately thereafter, a Detailed Land Use Map for the Hawaii Kai area was enacted, which was later amended ("1966 DLUM"). The 1966 DLUM showed potential land uses for Hawaii Kai. It designated approximately 100 acres of Queen's Beach for future resort use, five acres for future commercial use, and ninety-five acres for park and golf course use.

Effective January 2, 1973, the Revised Charter of the City and County of Honolulu ("1973 Charter"), as approved by the City's citizens, by a referendum vote held on November 7, 1972, became law, supplanting the 1959 Charter. On October 28, 1975, the City amended by ordinance the 1964 General Plan to clarify that DLUM's were not to be regarded as zoning

---

[9] (continued)
court of appeals is patently false. It is clear from the following excerpt from the City's Appellee Brief that the City did dispute Bishop's "facts":

> [T]he City urges the court to carefully examine those portions of the record cited by Bishop Estate in support of its "facts." In large part, the record fails to support them as stated. Because of the page limitation on the City's Brief, however, it is virtually impossible to address the multitude of overstatements and misstatements of facts contained therein.

Brief for Appellee at 7 n.5. Not surprisingly, the City still finds itself confronted with the task of addressing a multitude of overstatements and misstatements of fact.

[10] On April 27, 1961, Bishop entered into an agreement with Kaiser. That agreement designates Kaiser as Bishop's "independent contractor to subdivide, develop and improve" Hawaii Kai pursuant to the terms, most of them restrictive, of the agreement.

Bishop's claimed motivation for entering into the agreement with Kaiser, *see* Bishop's Petition, p. 3, was not presented in any form to the courts below. Accordingly, it should have no bearing upon this Court. *See Commissioner v. McCoy*, 484 U.S. 3, 6, *reh'g denied*, 484 U.S. 982 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)

maps, and were not to be considered as having priority over the provisions of the General Plan. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

On February 2, 1977, pursuant to the 1973 Charter, a General Plan for the City ("1977 General Plan") was adopted by resolution of the City Council.[11] That General Plan specifically identified Queen's Beach as a possible site for future resort development. On December 23, 1982, also pursuant to the 1973 Charter, the 1977 General Plan was amended ("1982 General Plan"). The 1982 General Plan differed from the 1977 General Plan in several respects, including the fact that Queen's Beach was not specified as a possible site of future resort development. Hence, until the passage of the 1982 General Plan, portions of Queen's Beach were planned for future resort use, but the zoning for all of Queen's Beach, while permitting residential use, did not permit resort use.[12]

As also required by the 1973 Charter, the City began in 1977 the process of formulating Development Plans for all areas of the City, including East Honolulu, which encompasses all of Hawaii Kai, including Queen's Beach.[13] In 1979, the

---

[11] The 1973 Charter provides that the General Plan contain:

> [T]he city's broad polices for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, state or federal. The statements shall include but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[12] For a full discussion of zoning ordinances applicable to Queen's Beach *see infra* Statement of Facts, Section C.

[13] Development Plans, as they were eventually formulated, are comprised of three elements: a written portion, which describes the area to which it is applicable as well as that area's long range goals, specific problems and planned future development; a land use map, which shows in pictorial form the future land uses for the area; and a public facilities map, which shows in pictorial form the area's existing public facilities and planned future public facilities.

City's Department of General Planning ("DGP") made public its proposed Development Plan Land Use Map for East Honolulu. This Development Plan Land Use Map proposed that a portion of lower Queen's Beach be designated for future resort uses and that the remainder of the property be designated for future preservation uses. In 1980, DGP proposed another Development Plan Land Use Map for East Honolulu containing the same designations for Queen's Beach ("1980 Proposed DP"). This proposed plan was submitted to the City Council, which, pursuant to the 1973 Charter, was required to enact Development Plans as ordinances. The 1980 Proposed DP was not adopted by City Council. Instead, the City Council passed a Development Plan Land Use Map for East Honolulu that was essentially consistent with a proposed land use plan submitted by Kaiser (without, incidentally, Bishop's approval) and that designated a portion of Queen's Beach for future resort uses and the remainder for future single-family residential uses. This Development Plan was vetoed by the Mayor (along with all but one of the seven other proposed Development Plans for the Island of Oahu passed by the City Council at the same time), for, among other reasons, its failure to adequately reflect the requirements of the 1977 General Plan.

In April, 1982, after reviewing input from both Bishop and Kaiser,[14] DGP made public another proposed Development Plan Land Use Map for East Honolulu ("1982 Proposed DP"), which eliminated future resort uses at Queen's Beach. Instead, it proposed that approximately eighty acres of Queen's Beach be designated for future park uses and that the remaining area of Queen's Beach be designated for future

[14] In rejecting Bishop's suggestion that the 1982 Proposed DP mirror the 1966 DLUM, DGP was not denying Bishop "uses expressly permitted by existing law. . . ." *See* Bishop's Petition, p. 9 n.14. After all, permitted uses are controlled by zoning, and the DLUM's were not to be regarded as zoning maps. *See* City and County of Honolulu Ordinance No. 4517; *Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

preservation uses.[15] On May 10, 1983, the 1982 Proposed DP, with minor changes, was adopted as the Development Plan Land Use Map for East Honolulu. That map reflected the fact that the 1982 General Plan had *not* identified Queen's Beach as a future resort site.

C. Zoning Ordinances Applicable To Queen's Beach

Applicable zoning has at all relevant times permitted development of Queen's Beach. Beginning in 1943, Queen's Beach was zoned to permit single-family residential uses. That zoning was in effect until March 1, 1984, when the zoning of Queen's Beach was amended to permit preservation uses. Preservation zoning allows many possible uses, such as public and private golf courses, vacation cabins and uses that are accessory to those uses.[16]

D. Efforts To Develop Queen's Beach[17]

Prior to 1971, Bishop made no effort to gain the necessary approvals to develop Queen's Beach. On or about February 8, 1971, Bishop applied to the City for a zone change on sixteen parcels in Hawaii Kai, including a request that 42.4 acres of lower Queen's Beach be rezoned for resort and

---

[15] Bishop's contention that the City "designated Queen's Beach as 'Park' and 'Preservation,' and refused to permit any economically viable private use," *see* Bishop's Petition, p. 4, is without merit for at least two reasons. First, the City did not "refuse" anything. Rather, Bishop never sought to develop the property under the existing land use regulations. *See infra* Section III.A. Second, Bishop failed to prove that there were no economically viable uses under those regulations. *See infra* note 27 and accompanying text.

[16] For a complete list of preservation uses *see* 649 F. Supp. at 929 n.4 (Appendix E 4-6 n.4).

[17] Bishop is, perhaps, most disingenuous in its description of its efforts to develop Queen's Beach. *See, e.g.*, Bishop's Petition, pp. i, ii n.1, 28. Bishop made only *two* specific applications for zone changes or development of Queen's Beach, *not seven*. Therefore, a patently false "fact" has been woven throughout Bishop's petition, beginning with all three of its questions presented.

commercial uses.[18] That application was met with substantial public opposition, including that of elected State legislators. The City deemed that application to be withdrawn as of July 10, 1971.[19]

No application has ever been submitted to the City to develop lower Queen's Beach in accordance with applicable zoning.[20] Only one application was ever submitted to the City to develop upper Queen's Beach, and that was submitted on March 18, 1983, in a now admitted, *see* Bishop's Petition, pp. 9-10, race of diligence with the proposed East Honolulu Development Plan, seeking approval to develop a single-family residential subdivision across approximately 120 acres of upper Queen's Beach. This one application was denied on May 19, 1983, after the May 10, 1983 enactment of the East Honolulu Development Plan had designated that portion of Queen's Beach for preservation uses.[21] Kaiser appealed the denial to the zoning board of appeals, which upheld the denial on March 8, 1984. Bishop never appealed that denial to Hawaii's state courts.[22]

---

[18] The City was not, as Bishop suggests, *see* Bishop's Petition, p. 6 n.8, required to zone Queen's Beach in conformance with the General Plan and the 1966 DLUM. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

[19] The City did not, as Bishop claims, refuse to consider the application. *See* Bishop's Petition, p. 6. By a letter dated May 24, 1972 to the City's Planning Department, Kaiser requested that a public hearing on its application be postponed, indicating that a revised application would be forthcoming. It never requested that the original application be processed any further. Thereafter, this application was considered withdrawn by the City.

The 1971 application was the only attempt to secure zoning for a resort at Queen's Beach. Therefore, Bishop's contention that "the City prohibited development of the resort," *see* Bishop's Petition, p. 4, is, at least, an overstatement.

[20] Lower Queen's Beach is the "makai," or "toward the ocean," portion of Queen's Beach comprised of roughly eighty acres.

[21] The application was denied on specified grounds set forth in a written decision, none of which were in any way related to proposed dedication of property.

[22] Knowing that from 1971 to the institution of this litigation only two applications were actually filed, Bishop's statement that its development

(continued)

E. The Alleged Unconstitutional Conduct

The City is a governmental body which has distinct legislative and executive branches, and the latter has a number of agencies, all as established and described by state law. Bishop, in its petition, makes no effort to delineate the final policy-making authority of the various components of the City's governmental structure, let alone establish where final authority rests in the areas of land use planning and regulation and the exercise of eminent domain authority. Rather, Bishop unjustifiably characterizes the acts or conduct of City personnel upon which it relies as that of "the City."[23]

In fact, all that Bishop is able to show is that certain individuals or agencies within the City government, at various times, personally desired a park at Queen's Beach. For instance, Bishop introduced evidence to show that, in 1973 and again in 1975, the Deputy Director of the City's Parks Department desired a thirty-seven acre park at Queen's Beach.[24] Neither

---

[22] (continued)
applications "made it a convenient target" becomes rather ludicrous. *See* Bishop's Petition, p. 18 n.24. The same holds true with regard to the statement that "[e]very conceivable type of land use was applied for at one time or another. . . ." *See* Bishop's Petition, p. 11. Aside from the fact that it only made two applications, Bishop also overlooks its obvious failure to apply for any of the potential uses allowed by present zoning. *See infra* Section III.A.

[23] For example, following its discussion of Deputy Parks Director Ramon Duran's 1975 press release, Bishop proclaims that "the City thus conceded its unlawful purpose to blight the subject property." *See* Bishop's Petition, p. 7 n.11. Certainly, Mr. Duran and "the City" are not interchangeable terms. The trial court recognized this at trial when it warned Bishop that "[i]f you're relying upon [Mr. Duran] only to prove your case, you're in bad shape." (RT 15-41).

[24] Petitioners' repeated reliance on the "blackmail" expression says a lot about their candor in dealing with this Court. Mr. Duran used the term at his deposition, where it was stipulated by all parties, including Bishop, that the word had been used "facetiously."

Bishop also provides the Court with a September 21, 1990 newspaper article (Appendix F) in support of its statement that the City "will hence-
(continued)

this particular official, nor the Parks Department as a whole, was vested with authority to acquire park lands on behalf of the City. Further, no funds were ever appropriated by the City in furtherance of this person's wishes.

Bishop also introduced evidence of the conduct of City employees at DGP. Again, none of these individuals, nor DGP itself, was vested with authority to regulate or condemn lands within the City's jurisdiction, including Queen's Beach.

None of the individual acts complained of rose to the required level of official action.[25] The district court concluded that no official action regarding a potential park at Queen's Beach was taken until 1982 (Appendix C 4), and the court of appeals, because of its findings on other issues, found it unnecessary to reach the issue.[26]

---

[24] (continued)
forth" engage in conduct which Bishop has concluded would violate constitutional guaranties, conduct Bishop also says was "evidently" precipitated "by the courts' failure" to stop it. *See* Bishop's Petition, p. 15 n.20. Simply put, the article is irrelevant to the issues presented on appeal. As if that were not enough, Bishop misrepresents the content of the article, and the conclusions Bishop draws from the article are nothing more than an unjustified affront to the City and, more importantly, to the Court.

[25] One seeking relief from a municipality pursuant to 42 U.S.C. § 1983 is required to prove that the conduct or action allegedly causing the constitutional deprivation was pursuant to the municipality's official policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

[26] The court of appeals stated that: "Because we find that Bishop did not offer any substantial evidence that it had no economically viable use for its property, we need not decide if the City took official action here. *See Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977) (acknowledging 'official action' requirement for inequitable precondemnation claim and finding such action in that case)." 913 F.2d at 576 n.3 (Appendix B 10 n.3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURTS BELOW PROPERLY CONCLUDED THAT A CAUSE OF ACTION FOR INEQUITABLE PRECONDEMNATION ACTIVITIES REQUIRES PROOF OF NO ECONOMICALLY VIABLE USE.

In its decision, the court of appeals stated that "[a] cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has '"denie[d] [him] economically viable use of his land."' *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))." 913 F.2d at 575 (Appendix B 9). Accordingly, the court of appeals concluded, as did the trial court (Appendix C 5), that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property. 913 F.2d at 575 (Appendix B 9-10).[27] Although Bishop disagrees with that conclusion and has petitioned for a writ of certiorari on that basis, the courts below have reached the right conclusion.

As it did during argument on the City's motion for directed verdict, in its appellate briefs, in oral argument

---

[27] Having reached the conclusion that Bishop's inequitable precondemnation activities claim required proof of no economically viable use, both the trial court and the court of appeals held that Bishop did not offer any substantial evidence that it had no economically viable use for its property. *See* Appendix C 5 and 913 F.2d at 576 (Appendix B 9-10).

In light of the holdings of both courts below, Bishop's assertion that "[e]ventually, Bishop Estate proved at trial that these ostensibly permitted uses were in fact infeasible," is a serious misrepresentation. *See* Bishop's Petition, p. 11 n.17. Further, with regard to the testimony of Bishop's expert witnesses, the trial court did not "insist" on anything. *See id.* Rather, the trial court ruled certain evidence inadmissible. Finally, the court of appeals did not "ignore the submission" of the claimed evidentiary error. *See id.* The court of appeals, in fact, found the exclusion of the evidence proper. 913 F.2d at 576 (Appendix B 10).

before the court of appeals and in its petition for rehearing, Bishop contends that proof of no economically viable use is not required as part of its inequitable precondemnation activities claim.[28] Rather than the availability of economically viable use, Bishop contends that the important elements of a claim for inequitable precondemnation activities are the bad faith or unreasonableness of the government's conduct. As the courts below have found, Bishop's contentions are wrong.

Bishop's contentions are wrong because Bishop does not extend its legal analysis of a claim for inequitable precondemnation activities far enough. Bishop's analysis begins and ends with the government's conduct. The impact of that conduct, however, must also be included in the analysis. Specifically, to establish liability for inequitable precondemnation activities, the impact of governmental conduct on the property must be so extensive that the property is regarded as "taken." *See, e.g., Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977); *Benenson v. United States*, 548 F.2d 939, 948 (Ct. Cl. 1977); *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 588 (Ct. Cl. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

A "taking," therefore, must be shown in order for Bishop to prevail under its inequitable precondemnation activities claim. The trial court so concluded (Appendix C 3-4), and the court of appeals agreed. 913 F.2d at 575 (Appendix B 8-9). The trial court also ruled that in order to show a "taking," the standard of no economically viable use, which is also applicable to regulatory takings claim, must be satisfied. (Appendix C 5). That is, Bishop was required to show that no economically

---

[28] For prosecuting this particular claim, Bishop relied principally upon *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), and *Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327 (9th Cir. 1977). Interestingly enough, Bishop, in arguing that something less than the standard of no economically viable use is the appropriate standard for its remaining takings claim, no longer relies on either *Martino* or *Richmond Elks*.

viable use was available to the property. The court of appeals, citing the recent Supreme Court decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), and *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984),[29] again agreed with the trial court. 913 F.2d at 575 (Appendix B 9). *See also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980);[30] *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n.36, *reh'g denied*, 439 U.S. 883 (1978).

The conclusion that a cause of action for inequitable precondemnation activities, like a regulatory takings claim, requires proof of no economically viable use is the proper one,[31] and, therefore, Bishop's petition should be denied.[32]

---

[29] Bishop cites *Kirby Forest* in support of its position that the standard for its inequitable precondemnation activities claim is something less than a denial of economically viable use. *See* Bishop's Petition, p. 25. *Kirby Forest*, however, lends no support to that position. 467 U.S. at 14-15.

[30] Bishop's suggestion that *Agins* endorses a standard other than the denial of economically viable use for claims of inequitable precondemnation activities is unavailing. *See* Bishop's Petition, p. 20. The clear implication of *Agins* is that, in order to succeed on its claim, Bishop was required to show that the City's precondemnation activities denied it economically viable use of Queen's Beach. 447 U.S. at 260, 261 n.9. While noting that the presence of "good faith planning activities" may vitiate liability, the *Agins* Court did not hold that an inquiry into good faith could replace the preliminary inquiry into the economic viability of uses.

[31] Far from creating the confusion and conflict complained of, *see* Bishop's Petition, p. 17, the decision in this case provides welcomed clarification regarding the elements of an inequitable precondemnation activities claim. By concluding that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property, the court of appeals implicitly found what the trial court clearly stated; namely, "substantial interference," as that term is used in *Martino*, 703 F.2d at 114, and *Richmond Elks*, 561 F.2d at 1330, in the context of an inequitable precondemnation activities claim, must, in order to be consistent with recent Supreme Court decisions such as *Nollan*, *Kirby Forest*, *Agins* and *Penn Central*, be read as "no economically viable use." (Appendix C 5).

[32] Bishop's reference to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and its statement that "[n]o reason appears why Honolulu should be able to accomplish what this Court held may not be done constitutionally by

(continued)

II. THE SO-CALLED *NOLLAN* CLAIM WAS NOT RAISED AS A SEPARATE CLAIM BEFORE THE TRIAL COURT.[33]

In its memorandum of decision, the court of appeals concluded that Bishop "failed . . . to specify at trial that it was pursing a *separate claim* based on unconstitutional exaction. We, therefore, have no factual record to assist us in ruling on this claim and hence do not reach this [claim]." 913 F.2d at 576 (Appendix B 10-11) (citations omitted and emphasis added). Bishop contends, in its petition for a writ of certiorari, that unconstitutional exaction was raised as a separate claim at trial. The conclusion reached by the court of appeals is, however, the proper one.

Bishop never did specify at the trial that it was pursuing a separate claim based on an unconstitutional exaction. Rather, Bishop always contended *at trial* that the conduct it now argues gives rise to its exaction claim was part of a "continuing course of conduct" giving rise to its inequitable precondemnation activities claim, not the basis of a separate and distinct claim for constitutional relief.[34] That earlier contention, unlike the present contention, was, of course, entirely

---

[32] (continued)
the federal government," *see* Bishop's Petition, p. 3 n.4, should be disregarded by the Court. In *Kaiser Aetna*, the Court found a taking through physical invasion of a privately owned marina. 444 U.S. at 180. No claim of physical invasion is being made herein, and, therefore, *Kaiser Aetna* has no bearing upon this case.

[33] A decision by the court of appeals that a claim was not raised at trial fails to satisfy the standards set forth in Rule 10 of the Rules of the Supreme Court of the United States governing review on a writ of certiorari. Since, however, those standards are "neither controlling nor fully measuring the Court's discretion," the City will respond to Bishop's argument.

[34] The remarks made by the City's trial counsel during opening statement to which Bishop makes reference in its petition, *see* Bishop's Petition, pp. 13-14, were in response to Bishop's continuing course of conduct claim as it was explained to the jury during Bishop's opening statement. Certainly, it would be much more probative for Petitioners to refer to specific instances where they articulated that the *Nollan* claim was being pursued at trial. Such proof is conspicuously absent from Bishop's petition.

consistent with the district court's ruling on the City's motion for summary judgment. Relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d at 1146-47, the district court held that Bishop's inequitable precondemnation activities claim was not subject to the Supreme Court's "finality" requirements, *see, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 472 U.S. 172 (1985), and, therefore, denied summary judgment *only as to that claim.* 649 F. Supp. at 943 (Appendix E 52) ("In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning inequitable precondemnation activities.")

The argument before the trial court on the City's motion for directed verdict is most instructive on this issue. Despite specific inquiry from the trial judge as to what claims were before the court,[35] not once did Bishop's trial counsel refer to a claim for unconstitutional exaction. In fact, in at least two instances, Bishop's trial counsel expressly stated that a claim for unconstitutional exaction *was not before the court.* The first instance involved the following exchange between the court and Bishop's trial counsel:

The court: Well, you're relying on *Martino*,[703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)] —

Mr. Jackson: Yes.

The court: Now, *Parks v. Watson*, [716 F.2d 646 (9th Cir. 1983)] too, I guess, huh?

Mr. Jackson: No, *Parks* was an unconstitutional exaction case.
(RT 36-57).

[35] Bishop's petition for a writ of certiorari repeatedly states that Bishop raised the *Nollan* claim "by every method known to law." *See* Bishop's Petition, pp. 16, 17, 19. Apparently, direct inquiries from the trial judge do not count.

In the second instance, Bishop's trial counsel made the following observation:

> *Mr. Jackson:* [W]e are now beginning to see the law begin to clear and the law is clearing in excessive exaction cases, under *Nollan,* [483 U.S. 825 (1987)] its clearing in over-regulation cases in *First Evangelical,* [482 U.S. 304 (1987)] and I submit that next case will be one like this, where there has been a course of conduct over a period of time that has culminated in not only temporary damages but a fee taking. . . .

(RT 36-64). Thus, the trial court did not address an unconstitutional exaction claim in its decision on the City's motion for directed verdict.[36]

Bishop's suggestion that the court of appeals reached a "wholly unjustified" and "baseless" conclusion simply does not withstand scrutiny. *See* Bishop's Petition, p. 19. The conclusion that an unconstitutional exaction claim was not raised at trial was fully supported by arguments made below. In its initial brief to the court of appeals, the City stated that "[Bishop] now seems to pursue a separate, independent claim of 'unconstitutional exaction,' whereas, at trial, it did not," Brief for Appellee at 10 n.9, and the City provided the court with an abundance of record cites to support that statement. Bishop, of course, had the opportunity to respond to the City's argument that unconstitutional exaction was not raised as a separate claim before the trial court in its reply brief, but Bishop failed to do so. The issue was then the subject of argument before the court of appeals.

The court of appeals, with the benefit of the aforementioned briefs and argument in addition to a full record review, concluded that Bishop did not raise the claim at trial. Bishop, unsatisfied with that result, availed itself of its right

[36] It should also be pointed out that the City did not address a claim for unconstitutional exaction in its motion for directed verdict or during argument thereon.

to petition for rehearing, and, as Bishop itself acknowledges, "[a]ll this was covered in [Bishop's] petition for rehearing." *See* Bishop's Petition, p. 13. That petition for rehearing was, of course, denied. 913 F.2d at 574 (Appendix B 6). The court of appeals had before it all of the arguments now being made to this Court and did not alter its conclusion that Bishop did not raise the claim at trial.[37]

Now, two levels removed from the trial court, Bishop's counsel of record continues to argue about what claims were presented at a trial in which he did not even participate. Just as the court of appeals was warned when faced with Bishop's petition for rehearing, so shall this Court be warned in light of Bishop's petition for a writ of certiorari. Do not fall prey to Bishop's desperate tactics, first alluded to by the City in its initial appellate brief. Therein, the City pointed out that the "continued lack of clarity of Bishop's claims is no doubt viewed by Bishop Estate as a means by which it can keep all doors open to possible appellate relief. . . ." Brief for Appellee at 11 n.10. It is time to close those doors once and for all by denying this petition.[38]

---

[37] Bishop's request for a remand to the court of appeals on this issue is incredible. *See* Bishop's Petition, p. 19. There is no justifiable reason why the court of appeals should hear the same arguments for a third time.

[38] In connection with the *Nollan* claim, Bishop cites Haw. Rev. Stat. § 46-6 and the ordinance enacted pursuant thereto, the so-called Park Dedication Ordinance. *See* Bishop's Petition, p. 12. Since these issues could conceivably have some relevance to Bishop's inequitable precondemnation activities claim, the City will address them. First, by passage of § 46-6, the State did not limit the City's power to impose park dedication conditions in contexts other than residential subdivision applications. Second, the City simply did not violate the provisions of its Park Dedication Ordinance. Bishop's one subdivision application met the Ordinance's requirements. The application was denied for reasons totally unconnected with noncompliance with statutory dedication requirements.

For similar reasons, the City will also respond to Bishop's argument that there was "no reasonable nexus" between a park and resort development. *See* Bishop's Petition, p. 12. It is clear that a municipality may not condition the grant of a land use permit or approval upon the concession by the applicant of a constitutionally guaranteed right unless the concession bears a rational relationship to the goals served by the permit or approval require-

(continued)

III. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF BISHOP'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION.

In affirming the district court's decision granting summary judgment against Bishop, the court of appeals stated: "The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Petitioner's Appendix E]." 898 F.2d at 113 (Appendix A 2). By affirming the district court's decision granting summary judgment against Bishop "for the reasons stated by Judge King," *id.* (Appendix A 2), the court of appeals affirmed the district court's dismissal of all but one of Bishop's claims based upon the finding that "[Bishop's] claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]." 649 F. Supp. at 949 (Appendix E 52). Despite Bishop's complaint that the ripeness standard has become a "puzzle," *see* Bishop's Petition, p. 16, the court of appeals and the district court properly found that certain of Bishop's claims are not ripe for federal court review.

A. Bishop Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Bishop Ever Sought A Variance From Preservation Zoning.

Far from being a "puzzle," the standard for when a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is well-settled. Two conditions must be satisfied. First, such claims are not ripe until the landowner has received:

"[A] final and authoritative determination of the type

---

[38] (continued)
ment. *Nollan*, 483 U.S. at 836. However, in no instance described by Bishop was City approval of any governmental benefit conditioned upon dedication of all or any portion of Queen's Beach. Without that essential prerequisite, there is no need to undertake the rational relationship analysis.

and intensity of development legally permitted on the subject property."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). *Accord Williamson County Regional Planning Comm'n*, 473 U.S. at 180, 190 n.11; *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, *amended*, 841 F.2d 872, 876 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988); *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Herrington v. Sonoma County*, 834 F.2d 1483, 1499 (9th Cir. 1987), *amended*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). As this Court has explained: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. In other words, " 'the nature and extent of permitted development' " must be "expose[d]" by virtue of the municipality's final decision. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348).

The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix A 2), that the Petitioners "have not submitted a development plan under the present land use regulations, which list at least twenty possible uses for the land. . . ." 649 F. Supp. at 940 (Appendix E 31). Bishop has, therefore, failed to obtain a final and authoritative determination of " 'the nature and extent of permitted development' " at Queen's Beach. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348). By failing to expose the extent of permitted development, Bishop has failed to satisfy the so-called "final decision requirement." *Herrington*, 834 F.2d at 1496.[39]

[39] Bishop maintains that it is a "mystery" how summary judgment could be granted on a point on which there was a conceded factual dispute. *See (continued)*

Bishop's shortcomings do not end there. The final decision requirement also requires a plaintiff to show that it has applied for and been denied a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 187-88; *Kinzli*, 818 F.2d at 1454). *Accord Lai*, 841 F.2d at 303; *Austin*, 840 F.2d at 680; *Shelter Creek Dev. Corp.*, 838 F.2d at 377. The district court found, and the court of appeals again agreed, 898 F.2d at 113 (Appendix A 2), that Bishop has never sought a variance from the regulations at issue, 649 F. Supp. at 942 (Appendix E 31), although Bishop has been able to apply for such a variance pursuant to § 6-1009 of the 1973 Charter. As this Court stated in *Williamson County Regional Planning Comm'n:* "[I]t is impossible to determine the extent of the loss or interference until the [municipality] has decided whether it will grant a variance from the application of its regulations." 473 U.S. at 192 n.12.

Having failed to submit a development plan under the present land use regulations and having failed to apply for a variance from those regulations, Bishop has absolutely failed to meet the final decision requirement. Therefore, its taking claims are not ripe for adjudication by a federal court.

---

[39] (continued)
Bishop's Petition, p. 4 n.5. The district court, however, explained away Bishop's purported mystery. In reaching its decision that Bishop had failed to satisfy the final decision requirement, the district court stated that:

> The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

649 F. Supp. at 942 n.21 (Appendix E 36 n.21) (emphasis in original).

B. The Futility Exception Does Not Excuse Bishop From Meeting The Final Decision Requirement.

Bishop does not claim that it satisfied the final decision requirement. Rather, Bishop seeks to avoid the requirement by claiming that "[h]aving to seek further City approvals[40] to achieve 'ripeness' would have been an exercise in utter futility. . . ." *See* Bishop's Petition, p. 28.[41] The so-called "futility exception" to the final decision requirement holds that the requirement may be avoided if the plaintiff can show that an attempt to comply with the requirement would be an " 'idle and futile act.' " *Kinzli*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). The plaintiff has the " 'heavy burden' " of showing futility. *Lake Nacimiento*, 841 F.2d at 876 (quoting *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981)).

Bishop cannot meet this heavy burden for the same reason that it cannot satisfy the final decision requirement. Bishop has never made *any* application, let alone a meaningful one, pursuant to the regulations at issue, nor has it made a meaningful application for a variance from those regulations. A plaintiff cannot rely on the futility exception until *at least* one "meaningful application" has been made to expose the type and intensity of development legally permitted on the subject property and *at least* one "meaningful application" has been made for a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876-77; *Herrington*, 834 F.2d at 1495-96; *Kinzli*, 818 F.2d at 1454-55.[42]

---

[40] Bishop suggests that this would be the eighth time it sought City approval, but *see supra* note 17 and accompanying text.

[41] Bishop claims futility on the basis that "the City" made it clear that it would not permit any private land uses unless Queen's Beach was donated to the City. For the problems with this claim *see supra* note 23 and accompanying text.

[42] The answer, therefore, to Bishop's question regarding the number of times a landowner "must beat his head against a brick wall," *see* Bishop's

(continued)

Bishop has never applied for permission to develop under the challenged regulations or for a variance from the challenged regulations. Therefore, the "futility exception" is not available to Bishop. That heavy burden has not been met. "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington*, 834 F.2d at 1496 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 188; *Kaiser Dev. Co.*, 649 F.Supp. at 942). Bishop merely alleges futility.

C. Bishop Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation.

The second condition that must be satisfied before a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is that the landowner must prove that state procedures for obtaining just compensation are inadequate. *See Williamson County Regional Planning Comm'n*, 473 U.S. at 196-97; *Hoehne*, 870 F.2d at 534; *Lake Nacimiento Ranch Co.*, 841 F.2d at 879-80; *Austin*, 840 F.2d at 680; *Kinzli*, 818 F.2d at 1455.[43]

---

[42] (continued)
Petition, p. 29, is at least once. Bishop cannot, however, meet the one meaningful application requirement.

The one meaningful application requirement also provides the answer to Bishop's inquiry regarding "combination of uses." Bishop asks whether a land owner must apply for all combinations of uses, *see* Bishop's Petition p. 29 n.31, and the answer is, of course, no. A land owner can resort to the futility exception after one meaningful application. Once again, however, Bishop cannot meet that requirement.

[43] Despite Bishop's grumblings about the "challenge" to the plaintiff, *see* Bishop's Petition, p. 27, the burden is upon the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate. . . ." *Williamson County Regional Planning Comm'n*, 473 U.S. at 197.

The courts below did not, as Bishop seems to suggest, construe *Williamson County* as requiring state court litigation even where state remedies are unavailable or uncertain. Rather, the district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix A 2), that Bishop "has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate." 649 F. Supp. at 942 (Appendix E 36).[44]

Bishop also suggests that it was "conceded" that Hawaii's procedures were unavailable or inadequate. *See* Bishop's Petition, p. 27. That suggestion requires elaboration. No such concession was made in this case. In *Lai*, the defendant City and County of Honolulu stipulated that there were no state procedures in Hawaii for recovering just compensation pursuant to inverse condemnation claims. Certainly, that stipulation does not constitute case law that bound the courts below in their deliberations in this case,[45] and it would appear, in fact, that the stipulation executed by the parties in *Lai* was ill-advised. In *Austin*, where the defendant City and County of Honolulu did not enter into a stipulation regarding the availability of state remedies, the Ninth Circuit concluded that the plaintiff could seek compensation pursuant to the Hawaii Constitution and Haw. Rev. Stat. § 101-3. 840 F.2d at 681. The *Austin* Court then held that the plaintiff's claim was not ripe because the plaintiff failed to prove that relief under those state laws would be inadequate. *Id.* at 680-81. *Austin* is conspicuously absent from Bishop's discussion of the availability and adequacy of state remedies.

---

[44] Without the benefit of elaboration, Bishop suggests that the decision by the court of appeals in this case "conflicts" with *Herrington*. *See* Bishop's Petition, p. 27. To the extent that the perceived conflict is that the second requirement of the ripeness doctrine was not applied in *Herrington*, the court there explained that it was not applying the requirement that the plaintiff prove that state procedures for obtaining just compensation are inadequate because no Fifth Amendment takings claims were being raised therein. 834 F.2d at 1499 n.10. Obviously, that is not the case here.

[45] The court of appeals specifically considered *Lai*, and concluded that the decision in *Lai* did not "change the validity of [the district court's] reasoning or the result in this appeal." 898 F.2d at 113 (Appendix A 2).

Finally, Bishop contends that state remedies are, in fact, unavailable in Hawaii state courts. In support of that contention, Bishop cites *City and County of Honolulu v. Chun*, 54 Haw. 287, 506 P.2d 770 (1973), and *Honolulu Memorial Park, Inc. v. City and County of Honolulu*, 50 Haw. 189, 436 P.2d 207 (1967). It should be pointed out as a preliminary matter that Bishop, in attempting to satisfy its burden on this issue, did not provide either of the courts below with these citations. Therefore, these cases should be given little, if any, weight by this Court.

In any event, these cases do not support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts. *Chun*, which Bishop, for the first time, cites for the proposition that "Hawaii courts did not permit an action in inverse condemnation seeking just compensation for takings affected by precondemnation blight," *see* Bishop's Petition, p. 27, is a direct condemnation action. Rather than offering any insight into how the court would handle an action in inverse condemnation, *Chun* discusses when the value of the taking is to be established in a direct condemnation action. 54 Haw. at 288-89. *Chun* concludes that, in a direct condemnation action, the value of the condemned property is set at the date of the summons. *Id.* at 289. *Chun* does not foreclose a property owner from filing an inverse condemnation action for damages occurring prior to that date.

Bishop's new-found reliance on *Honolulu Memorial Park* is even more misplaced. *Honolulu Memorial Park*, which Bishop cites for the proposition that Hawaii "did not even permit an action for just compensation for physical seizure of privately owned land," *see* Bishop's Petition, p. 27, is an action for ejectment. In explaining the nature of an action for ejectment, the Supreme Court of the State of Hawaii stated that "it does not in anyway include condemnation of property," 50 Haw. at 194, and, therefore, "evidence [of damages] is immaterial. . . ." *Id.* Obviously, neither of these cases can fairly be said to support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts.

The courts below properly concluded that Bishop had failed to prove that just compensation is not available under Hawaii law. Given that conclusion and the earlier conclusion that Bishop had failed to meet the final decision requirement, Bishop's takings claims are not ripe for federal adjudication.

CONCLUSION

For the foregoing reasons, including the Petitioners' failure to comply with Rule 14.5 of the Rules of the Supreme Court, the Respondent City and County of Honolulu respectfully urges this Court to deny the Petitioners' petition for a writ of certiorari.

Respectfully submitted,

H. BISSELL CAREY, III
Counsel of Record

STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of Corporation Counsel,
City and County of Honolulu

Attorneys for Respondent

March 8, 1991